Supreme Court, U.S.
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No. 95-1484

In The

Supreme Court of the United States

October Term, 1995

AMPHITHEATER PUBLIC SCHOOLS, et al.,

Petitioners,

v.

FAITH AITKEN,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Arizona

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties to the proceedings below were Faith Aitken, the Industrial Commission of Arizona, Amphitheater Public Schools, and Unigard Insurance Company. There are no parents or subsidiaries.

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I. THE FEDERAL ISSUE OF A TAKING WITHOUT DUE PROCESS WAS SUFFICIENTLY PRESERVED FOR THIS COURT'S JURISDICTION AND CERTIORARI REVIEW

Claims adequately raised on a petition for rehearing, but denied without opinion, may be accepted for certiorari jurisdiction if the state court does not strictly or regularly follow such a procedural rule precluding issues raised for the first time in a petition for rehearing. *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262-65, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). A procedural rule which is subject to discretion is not applied regularly. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

The Arizona Supreme Court has the discretion to hear constitutional issues at any time during an appeal. Rule 22 of the Arizona Rules of Civil Appellate Procedure allows a motion for reconsideration to discuss matters in which it is claimed the court erred in determination of facts and law. In this case, the Supreme Court of Arizona erred in its determination of law in that it created the due process problem. The court has never stated that it could not hear a new constitutional issue on a motion for reconsideration. Therefore, the matter was discretionary with the state court.

The Arizona Supreme Court's denial of the motion for reconsideration without opinion does not create a presumption of a procedural bar to the presentation of

the constitutional issues to the Arizona court. Specifically, this Court has stated:

> "Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."

Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), citing *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985), and *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). None of the cases relied on by Respondent are distinguishable from the instant situation based on whether there were other federal claims also involved. The point here is that the federal claim made on the motion for reconsideration was thus inserted into the case due to the absence of any express statement by the court that it would not consider the matter due to some procedural bar. Here, because there was no such express statement of an independent state procedural bar, and the constitutional claim could otherwise have been brought on the motion for reconsideration, the claim is preserved.

Although the Arizona Supreme Court's original opinion was based entirely on state law, the federal constitutional claims became part of the case when they were raised in the motion for reconsideration. They were properly before the state court. The court's denial of the motion for reconsideration without opinion failed to contain the plain statement that is necessary when a ruling

could have been based on either federal or state law. *See Harris, supra,* 489 U.S. at 261-66, 109 S.Ct. at 1042-45.

Respondent misplaces her reliance on cases which preceded *Banker's Life* and *Harris* to argue that this court cannot hear any new federal issues raised in a petition for review that is denied without opinion. Cases such as *Banker's Life* and *Harris* provide some of the basic rules on which Petitioners rely in their Petition and herein. And Respondent's reliance on *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992) is misplaced because the instant case is distinguishable from *Yee* in a very important way. In *Yee,* this Court would not review a federal claim that was first raised in a petition for review to the California Supreme Court on a decision of the California Court of Appeal, where the California Supreme Court denied discretionary review. This Court held that such a denial of discretionary review expresses no view as to the merits. *Id.* The instant case did not involve whether to accept discretionary review, but whether to grant a motion for reconsideration in a case that was already before the court on review. The "discretion" in this case wasn't whether to take review, but that the court had the discretion to take constitutional issues at any time, and therefore that there was no procedural bar. Thus, the *Yee* case sheds no light on what should be done in the instant matter, and this Court should not assume that the denial of the motion for reconsideration was due to a want of proper presentation in the state court.

Respondent's argument that the issues were not identified properly according to the requirement discussed in *Banker's Life* is without merit. The Petitioners expressly asserted the violations of takings and due process clauses

of the Fifth and Fourteenth Amendments because they were not given fair notice and a hearing to determine their "non-party" fault in the third-party action.

Because the court had the discretion to entertain the newly raised constitutional issues, the denial of the motion for reconsideration is not deemed to be a procedural bar. Further, because the federal issues were squarely before the court within a timely procedure for bringing those issues, the court's denial should have contained a "plain statement" that its decision was adequately based on state law and therefore would not consider the federal issues, but it did not. Therefore, the constitutional issues were preserved for review by this court.

II. THE ARIZONA SUPREME COURT'S OPINION IS A TAKING WITHOUT DUE PROCESS BECAUSE THERE WAS NO REALISTIC OPPORTUNITY TO HAVE NOTICE OR DEFEND AGAINST A CHARGE OF "NON-PARTY" FAULT IN THE THIRD PARTY SUIT, NOR IS THERE A REALISTIC OPPORTUNITY FOR NOTICE AND A HEARING IN FUTURE CASES.

The due process issue here is a procedural one that prevented the Petitioners from defending the employer's non-party fault in the third-party case before that finding of non-party of fault was applied to reduce Petitioners' lien. Respondent suggests that Petitioners had an opportunity to intervene in the third-party action, and failed to do so. For this proposition, Respondent relies on cases that preceded the lien statute by a dozen years, and which applied instead to different situations.

In *State ex rel. Industrial Commission v. Reese*, 74 Ariz. 425, 250 P.2d 1000 (Ariz. 1952) and *State ex rel. Industrial Commission v. Pressley*, 74 Ariz. 412, 250 P.2d 992 (1952), the Arizona Industrial Commission was entitled to intervene in civil law suits to recover benefits paid to workers who could only sue a third party if they made an election not to receive benefits from the commission. But these cases were not about an employer or its insurance carrier intervening in a third-party suit to protect its lien under A.R.S. § 23-1023(C). The lien statute here was created in 1965, and there is no evidence of any intervention of any worker's compensation carrier in a third-party suit since the enactment of the lien statute in 1965. There has been no need to do so because the law applied in every Arizona case until the time of the *Aitken* decision consistently refused to reduce carrier's lien even where an employer was contributorily negligent:

> "There is no provision in A.R.S. § 23-1023(C) to deny an employer a lien even if the employer was contributorily negligent. The right of an employer, or its workmen's compensation carrier, to enforce its lien under A.R.S. § 23-1023(C) against any judgment recovered by an employee on a third party action is not dependent on the employer's freedom from concurrent negligence contributing to the injury and a third party cannot assert such negligence as a defense or ask for indemnification from said employer or his carrier."

Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 409, 542 P.2d 1102, 1108 (Ariz. 1975). Shortly before the *Aitken* case arose, the Court of Appeals of Arizona also noted that

Arizona courts had consistently resisted efforts to limiting the compensation insurer's liens, stating that the carrier must be reimbursed according to the terms of the statute and that those terms cannot be modified by the courts. *Young v. Industrial Commission*, 146 Ariz. 582, 584-85, 707 P.2d 986, 988-89 (Ariz.App. 1985); *Boy v. Fremont Indemnity Co.*, 154 Ariz. 334, 336, 742 P.2d 835, 837 (Ariz.App. 1987). Therefore, at the time that Respondent brought her third party suit against Maya Construction in 1988 (or when the case went to trial in 1990), Petitioners would have had no need to seek to intervene in the third-party action, because of this consistent application of the of the law by the Arizona courts. Respondent points to what she believes to be constructive notice of the particular third-party law suit in this case, but under the consistent application of Arizona law, there would have been absolutely no reason for the carrier to intervene in the third party action to litigate the portion of its non-party fault in that action. Such a need never arose until the Arizona Supreme Court's decision in *Aitken*.

This Court has held that where repeated constructions of laws of a state have been consistently acted upon in practice, then a change in the decisional law that would have required a party to seek a remedy in a manner that is now unavailable and that previously was never opened to him, violates due process of law in its primary sense of an opportunity to be heard and defend substantive rights. *Brinkerhoff-Faris Co., v. Hill*, 281 U.S. 673, 680-81, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

When a party ***wilfully*** fails to avails itself of its opportunity to be heard, that does not constitute a violation of due process. *Weinco, Inc. v. Katahan Associates, Inc.* 965 F.2d 565, 568 (7th Cir. 1992.) At page 18 of the Respondent's Brief in Opposition, Respondent misquoted *Weinco* by leaving out the word "wilful," the most critical word of the sentence. There is no evidence of a "wilful" failure of the Petitioners to avail themselves of an opportunity to be heard regarding the assessment of non-party fault against them which was later used to reduce their lien. Failure to seek to intervene prior to the Arizona Supreme Court's even suggesting the issue in its 1991 case of *Dietz v. General Electric Co.*, 169 Ariz. 505, 821 P.2d 166 (Ariz. 1991), and therefore before a need even arose, cannot be deemed to be a wilful failure to avail oneself of an opportunity to be heard.

Respondent argues that the property rights that vested in the lien in 1990 are rights that are limited according to Arizona Supreme Court's 1995 Decision in *Aitken*, which, according to the Respondent, is retroactive to 1988, when A.R.S. § 12-2506 abolished joint and several liability. But the Arizona Supreme Court created *new* law out of two statutes:

> "We agree with the court of appeals that when the Arizona legislature passed [A.R.S. § 23-1023(C)], it did not anticipate the manner in which compensation liens would operate outside the universe of joint and several liability, which continued to exist as the law of this state for another twenty-two years. Nor is there evidence that the legislature considered this question in 1987 when A.R.S. § 12-2506 was adopted. In fact, some might argue that we created the

> 'problem' by our 1991 decision in *Dietz* and, therfore, that it should be amendable to a judicial solution."

Aitken v. Industrial Commission, 183 Ariz. 387, 391, 904 P.2d 456, 460 (Ariz. 1995); also at Petitioners' Appendix, pp. A-10 – A-11. Continuing, the court stated:

> "We now hold that a carrier may assert a lien on a third party recovery only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by the verdict in the action."

Id., 183 Ariz. at 392, 904 P.2d at 461; also at Petitioners' Appendix, p. A-12. As noted in *Brinkerhoff-Faris, supra*, due process rights can be violated when the judiciary construes otherwise valid statutes. 281 U.S. at 679-680. Here, the court took two statutes, each valid on their own, and construed them in a way so as to deprive the Petitioners of their due process to be heard.

A statutory amendment cannot be retroactively applied to defeat a vested right. *In re Dos Cabezas Power Dist.*, 17 Ariz.App. 414, 498 P.2d 488 (Ariz.App. 1972). The Arizona Supreme Court holds that its opinions are retroactive unless otherwise stated, and that basically it is a policy issue for the court to decide whether or not to make a case retroactive. *See, Law v. Superior Court of the State of Arizona, Supplemental Opinion*, 157 Ariz. 147, 1160-1162, 755 P.2d 1135, 1148-1150 (Ariz. 1988). However, when the court itself makes new law that was not foreseen, or even interprets a statute in a way that was not foreseen (in 1988-1990), its opinion should not be permitted to retroactively take away rights that otherwise have vested. To do so is to allow the court exercise a

limitation on rights before the Petitioners had any reasonable need or reason to intervene in the third party suit. Due process is denied to Petitioners because by the time any change in the law was foreseen or could have been anticipated, the time to intervene in a third-party suit had already passed. *Brinkerhoff-Faris, supra.*

Tracy v. Ginzberg 205 U.S. 170, 27 S.Ct. 461, 51 L.Ed. 755 (1907), does not apply here because the Petitioners were not a party to the third-party law suit in which its non-party fault was determined that was used to reduce its lien rights. This reason also further distinguishes this case from those cited by Respondent that a party is not denied due process when it litigates its own right to a particular item of property. And while Petitioners had a right in this action before the Arizona courts to argue the meaning of the lien statutes or how they are to be construed, there can be no denying that prior to the *Diez* case in 1991, the Petitioners had no basis or reason to seek to intervene and litigate their non-party fault in the third-party action which was over with by the time the *Dietz* opinion was handed down, and therefore, they had no meaningful opportunity to be heard.

Finally, despite the constructive notice that Respondent alleges the Petitioners had in this case, there simply is no notice requirement under the worker's compensation law that a worker would have to notify an employer or carrier of a third party law suit. And even if intervention in the third-party law suit is a way to protect the assignment of non-party fault against the employer, this still requires a notice provision, and the Respondents have pointed to none.

CONCLUSION

Jurisdiction of this matter is appropriate, and this Court should grant the Petition to correct the unjust taking without due process that occurred in this case in violation of the Fifth and Fourteenth Amendments.

April 29, 1996

Respectfully submitted,

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